No. 12873

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLANT'S BRIEF IN ANSWER TO BRIEF OF UNITED STATES AS AMICUS CURIAE.

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Appellant respectfully submits this reply to the brief filed herein by the United States as *amicus curiae,* dealing with the effect of the statute of limitations and the doctrine of laches.

ARGUMENT.

I.

Appellee's Action Is Barred by the California Statute of Limitations Under the Federal Rules of Decision Act, as Amended in 1948.

Amicus curiae's argument against the application of state statutes of limitations to a veteran's action under the Selective Service Act is based upon the premise that an action for reinstatement with or without incidental damages is exclusively equitable in character. *Amicus*

curiae relies entirely upon the decision in *Holmberg v. Armbrecht* (1946), 327 U. S. 392 (A. C. Br. pp. 2, 4, 8-10), decided in 1946, and relegates to a footnote (A. C. Br. p. 10, note 11) its analysis of what it calls the "minor change" made in the Rules of Decision Act two years later in 1948.

It is clear that reinstatement of the veteran is a remedy which falls within the class of those traditionally given only by courts of equity. It is not so clear that the monetary damages sought by and awarded to appellee constitute an equitable remedy or even an incident to the equitable remedy of reinstatement, in view of the cases cited by *amicus curiae* where veterans have been permitted to recover damages alone without reinstatement (A. C. Br. p. 5, note 2). And in the case of *Walsh v. Chicago Bridge & Iron Company* (N. D. Ill. 1949), 90 Fed. Supp. 322, a veteran's action for damages alone was treated as being legal in nature and was held to be barred by the Illinois statute of limitations (see Op. Br. p. 25; Rep. Br. p. 7).

Nevertheless, assuming for the purposes of argument that the appellee's entire action, including his claims to reinstatement and damages, is one which historically would have been regarded as within the exclusive jurisdiction of equity, the argument of *amicus curiae* will not stand up in the light of the modern union of law and equity and the correlative amendment made in 1948 to the Federal Rules of Decision Act (28 U. S. C., Sec. 1652).

Amicus curiae cites *Holmberg v. Armbrecht* (1946), 327 U. S. 392, in support of its argument that because this action "is cognizable solely in equity, the Federal

Rules of Decision Act, 28 U. S. C., Section 1652, does not require the court to follow state statutes of limitation" (A. C. Br. p. 8). But *Holmberg v. Armbrecht* did not in any way construe 28 U. S. C., Section 1652, for it was decided two years prior to the revision of the Judicial Code which brought that section into being. The Rules of Decision Act, as it existed at the time of the decision in *Holmberg v. Armbrecht,* was embodied in Revised Statutes, Section 721, 28 U. S. C., Section 725, and it then provided.

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision *in trials at common law,* in the courts of the United States, in cases where they apply."[1]

Thus when the Supreme Court decided in *Holmberg v. Armbrecht* that the action there concerned "not only a federally-created right but a federal right for which the sole remedy is in equity," the case was thereby immediately taken out of any possible sphere of application of the Rules of Decision Act as it then stood, with its express limitation to "trials at common law." The court then pointed out that the *Holmberg* case, concerning a federally created right, was not one where the court's jurisdiction was based on diversity of citizenship and where the duty of a federal court was to apply state law as closely as might be under the principle of *Erie R. R. v. Tompkins* (1938), 304 U. S. 64. Being bound neither

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[1]Emphasis here, as elsewhere in this brief, is supplied unless otherwise noted.

by the Rules of Decision Act nor by the doctrine of the *Erie* case, the court decided that it was not required to apply the state statute of limitations.

Amicus curiae, like appellee, seeks to apply *Holmberg v. Armbrecht* to this case as the controlling authority, despite the fact that the statutory law on the subject has been changed since the date of that decision. In the light of the Federal Rules of Civil Procedure, providing for one form of action, a "civil action," and applying in all civil suits "whether cognizable as cases at law or in equity" (F. R. C. P. Rules 1 and 2), the Rules of Decision Act was amended effective September 1, 1948, to provide that state laws shall be regarded as "rules of decision *in civil actions* in the courts of the United States, in cases where they apply" (28 U. S. C., Sec. 1652). If the clear language of the amended statute means what it says, or if, indeed, it means anything at all, then it must lead to the result that *Holmberg v. Armbrecht* is no longer the law and that, in the absence of a limitation period specified by Congress, state statutes of limitations are now applicable to actions in the federal courts to enforce federally created rights where the suit would historically have been one of purely equitable cognizance, just as they have for many years been applicable to actions at law in the federal courts to enforce federal rights.

Similar language in 28 U. S. C., Section 1404(a) authorizing the federal district courts to apply the doctrine of *forum non conveniens* and to transfer "any civil action" to any other district where it might have been brought, was recently applied by the Supreme Court to an action by the United States for an injunction and other relief under the Sherman Act in *United States v. National*

City Lines (1949), 337 U. S. 78. That action, which was thus held to be within the meaning of the phrase "any civil action," was clearly one which was traditionally cognizable only in equity and which involved a purely federal right. The decision was based upon the court's concurrent decision in *Ex parte Collett* (1949), 337 U. S. 55, in which the same *forum non conveniens* statute was applied to a suit under the Federal Employers' Liability Act and in which Chief Justice Vinson said (337 U. S. at 58):

> "The court below relied on the language of §1404 (a), *supra,* which it regarded as 'unambiguous, direct, clear.' We agree. The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from 'any civil action.'"

This reasoning applies with equal force to the words "in civil actions in the courts of the United States" as used in the Rules of Decision Act, as amended.

Amicus curiae's argument as to the construction of the amended statute (A. C. Br. p. 10, note 11) is one which we must confess we are completely unable to follow. *Amicus curiae's* statement that the cases to which state laws apply under the statute are defined by the phrase "cases where they apply" seems to us to be a masterpiece of circular reasoning. Clearly, the phrase "in cases where they apply," as related to our case, must mean that where a state statute of limitations applies to similar suits in equity in the state courts, it must now be applied to such a suit in equity in the federal courts in the absence of an applicable federal period of limitations.

The argument of *amicus curiae* to the contrary ignores the many decisions in which actions at law in the federal courts for the enforcement of federally created rights have been held to be cases to which state statutes of limitations applied under the Rules of Decision Act prior to its 1948 amendment.[2]

And *amicus curiae's* argument was expressly rejected in *Campbell v. Haverhill* (1895), 155 U. S. 610 (cited in Op. Br. p. 26; Rep. Br. p. 8, and Appendix), where the Supreme Court held an action in a federal court for patent infringement to be barred by a Massachusetts statute of limitations. There the court said (at pp. 614-615):

> "It is insisted, however, that by the express terms of section 721, the laws of the several States should be enforced only 'in cases where they apply,' and that they have no application to causes of action created by Congressional legislation and enforceable only in the Federal courts. The argument is, that the law of the forum can only apply to matters within the jurisdiction of the state courts, and that the recognition given by Congress to the laws of the several states does not make such laws applicable to suits over which the state courts have no jurisdiction, because for want of jurisdiction over the subject-matter of the suit,

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[2]As noted in our Opening Brief (pp. 24-27), state statutes of limitations have been consistently applied under the Federal Rules of Decision Act to actions in the federal courts for infringement of patents, for overtime compensation and liquidated damages under the Fair Labor Standards Act, and to actions for treble damages under the antitrust laws. Additional cases in which this Court has held such actions to be subject to the limitation period specified in California Code of Civil Procedure, Section 338, Subdivision 1 (the statute which we contend applies here) are *Burnham Chemical Co. v. Borax Consolidated, Ltd.* (9 Cir. 1948), 170 F. 2d 569; *Culver v. Bell & Lofland, Inc.* (9 Cir. 1944), 146 F. 2d 29, 31-32; and *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir. 1936), 85 F. 2d 742, 751-752.

the tribunals of the State are powerless to enforce the state statutes with respect to it; in other words, that the Sates, having no power to create the right or enforce the remedy, have no power to limit such remedy or to legislate in any manner with respect to the subject-matter. But this is rather to assert a distinction than to point out a difference . . ."

And further, at pages 616-617:

"Recurring then to the main proposition above stated, it may be well questioned whether there is any sound distinction in principle between cases where the jurisdiction is concurrent and those where it is exclusive in the Federal courts. The section itself neither contains nor suggests such a distinction. The language of the section is general that the laws of the several States shall be regarded as rules of decision in every case to which they apply, and it is at least incumbent upon the plaintiff to show that, for some special reason in the nature of the action itself, the section does not apply. But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defenses to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?

> "Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs, who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions . . . This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams v. Woods,* 2 Cranch. 336, 342, of a similar statute: 'This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.' "

Now that Congress has spoken by its amendment of the Federal Rules of Decision Act, the reasoning of the Supreme Court in *Campbell v. Haverhill, supra,* is equally applicable to the instant action even if regarded as a suit cognizable only in equity. No more reason exists for denying the application of state limitation statutes to a suit in a federal court on a federally created right which was historically enforceable only in equity than to an action in a federal court on a federally created right traditionally enforceable at common law. In either case the provision of the Rules of Decision Act giving controlling effect to Acts of Congress leaves it completely within the power of that body to specify the limitation period which it deems appropriate for actions for the enforcement of any right created by federal law. When Congress does not specify such a period, it is entirely reasonable to assume that it is satisfied to have the limitation statutes of the several states applied under the Rules of Decision Act.

Amicus curiae argues that no reason exists in this case for applying state rules in federal courts (A. C. Br., p. 11)

and that the nature of the reemployment remedy given veterans is unique and has peculiarly federal characteristics which eliminate the usual reasons for applying state rules of decision (A. C. Br., p. 12). It is to be noted, however, that this Court in *Tsang v. Kan* (9 Cir. 1949), 173 F. 2d 204, held that the state courts have jurisdiction of veterans' suits for reinstatement and damages under the Selective Service Act, concurrent with that of the federal courts, and thus apparently felt that the peculiarly federal characteristics pointed out by *amicus curiae* (*i. e.,* right to representation by United States Attorney, freedom from costs, etc.) were not sufficient to make the federal jurisdiction exclusive.

No policy against the application of state statutes of limitations is implicit in the Selective Service Act. If state statutes do not apply to veterans' reinstatement actions, then no period of limitations is applicable. Yet the policy of the Act, as evidenced by its provisions for a speedy hearing and advancement on the calendar, favors prompt action in order to enable the veteran to regain lost skills and to reenter civilian life with as little difficulty as possible. (See *Kay v. General Cable Corp.* (D. N. J. 1945), 59 Fed. Supp. 358, 360; *Daniels v. Barfield* (E. D. Pa. 1948), 77 Fed. Supp. 283, 285.)

The cases cited by *amicus curiae* do not compel any different conclusion. *Connecticut Mutual Life Insurance Company v. Schaeffer* (1876), 94 U. S. 457 (cited in A. C. Br. p. 11), involved a conflict between state and federal *statutes* governing rules of evidence in the federal courts; and *Byron Jackson Co. v. U. S.* (S. D. Cal. 1940), 35 Fed. Supp. 665 (cited in A. C. Br. p. 11), is not analogous, as it involved an action against the United States under the Tucker Act on a government contract, in which

the policy favoring the application of the same substantive rules of law throughout the country is far stronger than in a case like this one where a private individual is given a right against other private persons under the terms of an Act of Congress. Our case is much more analogous to the cases referred to above where statutes of limitations were applied to suits by individuals under the Fair Labor Standards Act, the anti-trust laws and the patent statutes.

Indeed the insistence of *amicus curiae* upon a perpetuation of the historical dichotomy between actions at law and suits in equity is not only lacking in logical foundation but is completely anachronistic. This is particularly true with respect to the applicability of statutes of limitations to equitable proceedings. In the earlier forms of the statutes of limitations the provisions were in express terms confined to actions at law. But the modern forms of these statutes in the American states generally declare that the periods of limitations apply to equitable suits as well as to legal actions, and the applicability of statutes of limitations to equitable proceedings appears to be unquestioned in most jurisdictions in which distinctions between legal and equitable forms of action have been abolished. (2 *Pomeroy's Equity Juris.* 5th Ed. 172, 174, Secs. 419a, 419b.) That distinction has long been abolished in California and its statutes of limitations apply equally to actions which historically would have been deemed exclusively equitable. As we have already pointed out (Op. Br. pp. 29-30, 35; Rep. Br. p. 12) the limitation period specified in Section 338, Subd. 1 of the California Code of Civil Procedure has been applied by the California courts to actions for reinstatement of police officers and school teachers under California statutory provisions giving them that right. *Jones v. Board of Police Commissioners,* 141 Cal. 96, 74 Pac. 696; *Harby v. Board of Education,*

2 Cal. App. 418; 83 Pac. 1081. Those actions to compel reinstatement are just as exclusively equitable in nature as is a veteran's action for reinstatement under the Selective Service Act.

The distinction between actions of law and suits in equity survived longer in the federal courts than it did in California and in many of the other states. That distinction was abolished, however, in 1938 with the promulgation of the Federal Rules of Procedure. The 1948 amendment to the Rules of Decision Act making state laws applicable "in civil actions in the federal courts," in the absence of controlling federal law, constituted an additional and logical step in carrying out the abolition of the historical distinction. As we have pointed out, no reason exists for denying the application of state limitation statutes to "equitable" civil actions in the federal courts based on federally created rights which has not been considered and rejected by the courts in connection with the application of state statutes of limitations to actions at law in the federal courts to enforce rights having a similar origin.

The words "in civil actions" in the Rules of Decision Act, as amended, particularly when construed in the light of the provisions in the rules that there shall be but one form of action to be known as a civil action, import no exclusion such as that contended for by *amicus curiae* and appellee. To construe that language as excluding actions, which were historically exclusively equitable in character, for the enforcement of federally created rights would deprive the amendment of any effect whatsoever and would do violence to the language used by Congress. It would leave actions of this type subject to no limitation period whatsoever without any valid reason in policy or logic for thus creating an especially privileged class of plaintiffs.

II.

The Trial Court's Finding That Appellee's Action Was Not Barred by Laches Is Not Supported by Any Substantial Evidence.

In its argument in support of the trial court's finding that laches did not exist in this case, *amicus curiae* attempts to simplify its problem by breaking down the three year and seven month period of delay into segments which are more easily explainable and which compare more favorably with periods of delay which the courts have in some cases held not to be unreasonable.

The first segment dealt with by *amicus curaie* is the year 1946 (comprising only about 28% of the total period elapsed before filing suit). It attempts to throw on appellant's shoulders the responsibility for the delay up to June, 1946, stating that until then Sanger's status was still being negotiated and he had not been told his claim was finally rejected (A. C. Br. p. 16). This, of course, is contrary to the undisputed evidence, as Sanger himself admitted that he was informed by Kerr in December, 1945 or January, 1946 that the company did not believe he had any rights under the Selective Service Act [R. 217], and the District Court found (in accordance with the Stipulation) that Plomb refused to reinstate Sanger on his prewar basis at the time when he applied for reemployment in January, 1946 [Find. VI, R. 13]. Further evidence that Sanger was under no illusions on this score appears in his own first letter to the Selective Service officials written on March 20, 1946, in which he said that "Mr. Kerr refused to give me my old job back" and sought assistance in "obtaining my old position again" [Ex. 33].

Amicus curiae attempts to justify the delay during the latter half of 1946 by a discussion of the time-consuming

nature of the activities required by law of the Director of Selective Service in attempting to arrange an amicable adjustment (A. C. Br. pp. 17-18), which in this case terminated without success in October, 1946, and further by pointing out that during November and December, 1946, the United States Attorney had to make his own determination as to the merits of the claim (A. C. Br. p. 19).

The second segment into which *amicus curiae* divides the period of delay begins with the transmission of the case to the United States Attorney in November, 1946, and ends in February, 1948, when the United States Attorney at Chicago must have concluded, in performing his legal duty under Section 8(e) of the Act, that he was not "reasonably satisfied" that Sanger's claim was valid, and when he returned the file to Sanger with a refusal to represent him [A. C. Br. pp. 19-20; R. 14]. No explanation whatever is given for the delay during this period of some fifteen months except a further discussion of the assertedly necessarily slow speed with which the wheels of government move. There is of course no evidence as to the actual activities of the United States Attorney during this period, nor is there any indication that Sanger did anything during that period to hurry the completion of the administrative processes referred to by *amicus curiae*. The record is clear however that Plomb heard nothing from either Sanger or the government officials from December, 1946, when Pendleton and Kerr met Sanger in Atlantic City [R. 134-135, 179-180] until its counsel received the letter of February 28, 1948, from Sanger's private counsel in

Chicago [Ex. 38]. This fourteen months of silence would have justified Plomb in concluding that the claim had been abandoned or at least, as apparently was the fact, that the government officials had determined that it was without merit.

Although in some cases delay resulting from inaction of government officials has been said not to be the fault of the veteran, we have seen no case which goes so far as to excuse on that ground a delay of over two years such as that here involved (15 months with the United States Attorney plus the additional time theretofore consumed by the Selective Service officials).[3] We submit that delays of gov-

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[3]Mr. Sanger was in no way ignorant of the law or procedure as was the case in *Juelich v. Syracuse Baseball Club, Inc.* (N. D. N. Y. 1948), 15 C. C. H. Labor Cases, Para. 64,689 (cited A. C. Br. p. 21) where the court excused a delay of about six months on that ground. In *Hayes v. Boston & Maine R R.* (D. Mass. 1946), 66 Fed. Supp. 371, affirmed (1 Cir. 1947), 160 F. 2d 325 (A. C. Br. p. 21), the delay was only five months, and the opinion contains no mention of the delay being attributable to government officials. In *Coon v. Liebmann Breweries, Inc.* (D. N. J. 1949), 86 Fed. Supp. 333 (A. C. Br. p. 21), the *total* delay was only fifteen months, rather than the three years and seven months present in this case. The other cases cited by *amicus curiae* in support of its contention that delay resulting from inaction of government officials cannot give rise to laches are readily distinguishable (see A. C. Br. p. 21, note 15). In *N. L. R. B. v. Sun Tent Luebbert Co.* (9 Cir. 1945), 151 F. 2d 483, 488, and *N. L. R. B. v. Andrew Jergens Co.* (9 Cir. 1949), 175 F. 2d 130, 134, the delay in question was that of the National Labor Relations Board in deciding the case in the first instance; and in *Fleming v. Tidewater Optical Co., Inc.* (E. D. Va. 1940), 35 Fed. Supp. 1015, 1017, the respondent's argument apparently was that the government's investigator should have acted sooner rather than to permit the occurrence of sixteen months of violations of the Fair Labor Standards Act.

ernment officials cannot go on forever without constituting laches, particularly where the explanation of the delay rests only upon the basis of rather doubtful judicial notice of the administrative processes involved and where the evidence does not show that the veteran was sufficiently interested to attempt to speed up those processes.

The third segment of the period of delay, which *amicus curiae* very properly makes no attempt to explain, consists of the nineteen months from February, 1948, when the United States Attorney turned over the file to Sanger, until September 22, 1949, when this action was filed. During that nineteen months Sanger himself was in complete control of the matter and the fact that more than two years had already elapsed since the initial refusal of reinstatement should have increased his responsibility to act promptly. Nevertheless he delayed until nine months after the last of several positive rejections of his claim on November 4, 1948 [Ex. 46].

Neither appellee nor *amicus curiae* has pointed out the slightest evidentiary support for the finding that appellant contributed to the delay. As noted above, *amicus curiae* contends only that appellant contributed to the delay up to June, 1946 (A. C. Br. p. 16), after which three years and three months elapsed before the action was filed. At no time during the entire period did appellant deviate from its original position taken in January, 1946, that Mr. Sanger had been an independent contractor and hence was not entitled to reinstatement on his pre-war basis as demanded by him. Appellant simply showed common

courtesy in conferring and corresponding with Selective Service officials and with Sanger's private counsel [Exs. 35-47].[4]

Amicus curiae argues that there was no unreasonable delay in 1946 and that delays thereafter are irrelevant because they could not have prejudiced appellant during 1946, the only year for which damages were awarded (A. C. Br. p. 20). But the delay is prejudicial to the employer, not only because he is required to pay twice for services already rendered, but also because of the obvious fact that reinstatement of the veteran after others have carried on his work during the three years and seven months while the veteran delayed filing suit must cause far greater disruption of the employer's organization and business than it would at an earlier time when the veteran's contact with the employer's business was fresher and when the acquaintance of other employees with the veteran's particular job was of less duration. Furthermore, this approach is completely at variance with the views of substantially all the courts which have considered the problem and which

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[4]Of the cases cited by *amicus curiae* in purported support of the proposition that appellant is barred from asserting laches because it contributed to the delay (A. C. Br. p. 16), none is factually comparable to this case. In *Byrd v. North American Aviation Co.* (S. D. Cal. 1948), 15 C. C. H. Labor Cases, Para. 64,614, the employer had purported to reinstate the veteran and had placed him in a lay-off status with a promise to recall him in the future, which the court found was made in bad faith and without intention of performing. There was no discussion of the employer's contribution to the delay in *Special Service, Inc. v. Delaney* (5 Cir. 1949), 172 F. 2d 16, or in *Hayes v. Boston & Maine R. R.* (D. Mass. 1946), 66 Fed. Supp. 371, affirmed (1 Cir. 1947), 160 F. 2d 325; and in *Watkins Motor Lines v. De Galliford* (D. Ga. 1947), 13 C. C. H. Labor Cases, Para. 63,880, affirmed (5 Cir. 1948), 167 F. 2d 274, the court merely stated that the employer was responsible for much of the delay without reference to the facts.

have held that a delay of only a few months in filing suit precludes the award of damages for any period *prior to the commencement of the action* (see Op. Br. pp. 65-68 and cases therein cited).

In any event, for the purpose of applying the doctrine of laches, prejudice is presumed to have resulted from the delay where, as here, the statutory period of limitations has run. As the court said in *Wilson v. Plutus Mining Co.* (8 Cir. 1909), 174 Fed. 317, an equity suit (at pp. 320-321):

> ". . . When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches, and, *when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case. . . .*"

See also:

> *Taylor v. Salt Creek Consolidated Oil Co.* (8 Cir. 1922), 285 Fed. 532, 540-541.

The effect of awarding Sanger damages based on 1946 earnings, when coupled with the extreme delay here present, was to permit Sanger to wait until it became obvious that Plomb's business for 1946, which appellee characterizes as the "cream year" of all (App. Br. p. 55), would yield him more than he had earned from other sources during the same period and would thus make the suit profitable even if his recovery were made subject to offset for his other earnings, as might have been expected. This result was never intended by the Selective Service Act, and such

speculative waiting is not favored by courts of equity. In *Taylor v. Salt Creek Consolidated Oil Co.* (8 Cir. 1922), 285 Fed. 532, *supra,* the court, in holding an action to establish an interest in oil lands to be barred by laches, said (p. 544):

> "It was a period of speculative, watchful waiting on his part. Such speculative waiting is not favored in equity, . . ."

In summary, an over-all view of the facts demonstrates the lack of equity in Sanger's case. His early knowledge that appellant refused reinstatement on his pre-war basis, his lack of interest during the entire time that the file was in the hands of the United States Attorney, his delay of nineteen months following the return of the file to him, his speculative waiting, and his gross earnings of nearly $90,000 from other sources during the period of delay, when compared with the prejudice to appellant, both in terms of dollars and disruption of its organization, serve to demonstrate that this is a proper case for the application of the doctrine of laches.

While citing and quoting from the case of *Russell v. Todd* (1940), 309 U. S. 280 (A. C. Br. pp. 13-14, note 12), *amicus curiae* chooses to ignore the portion of the opinion in that case relied on in our Opening Brief (pp. 34-35) where the court said through then Mr. Justice Stone (309 U. S. at 293):

> "We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. . . ."

As already pointed out (Op. Br. pp. 34-35; Rep. Br. p. 12) *Russell v. Todd* was a suit of exclusively equitable cognizance involving enforcement of a federal statutory right, and the only reason that the court in that case did not adopt and apply by analogy the state statute of limitations was that it was there shown that the state courts did not apply that statute to equitable actions. Here the California statute on which we rely has clearly been applied by the California courts to equitable actions for reinstatement, and no ground for refusing to apply it exists on the basis of any "special equitable doctrines" such as those referred to by the court in *Russell v. Todd* in its footnote in 309 U. S. p. 288 (quoted by *amicus curiae* in the second paragraph of note 12, A. C. Br. p. 14).

Conclusion.

The 1948 amendment to the Rules of Decision Act makes state statutes of limitations binding upon the federal courts in exclusively equitable actions for the enforcement of federal statutory rights, in the absence of a limitation period specified by Congress. Furthermore, appellee was guilty of laches, and in any event under the rule of *Russell v. Todd, supra,* the three-year state limitation period applicable to like equitable actions should have been applied by analogy wholly aside from the Rules of Decision Act.

On either ground, the action should have been held to be barred by delay, and the judgment of the District Court should be reversed.

Respectfully submitted,

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